

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

TARA KEMP and	:	
MICHELLE LUCAS,	:	C.A. No. 07C-11-019 JTV
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
MARGARET A. MILLER,	:	
	:	
Defendant.	:	

Submitted: March 7, 2012
Decided: May 10, 2012

ORDER

Upon Defendant's Motion for Costs.
Granted in part.

Charles E. Whitehurst, Jr., Esquire, Young Malmberg & Howard, P.A., Dover, Delaware; attorney for the Plaintiffs.

Stephen P. Casarino, Esquire, Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware; attorney for the Defendant.

WITHAM, R.J.

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FACTS

This was an auto accident case in which Margaret A. Miller's (hereinafter "Defendant") automobile struck the rear of an automobile driven by Plaintiff Tara Kemp when both vehicles were in the acceleration lane leading onto U.S. Route 13 southbound, south of State Route 42. Plaintiff Michelle Lucas was in the passenger seat of Plaintiff Kemp's vehicle. The jury found in favor of Defendant on February 15, 2012. Pursuant to Superior Court Civil Rule 54(d), Defendant moved for costs in a timely manner on February 21, 2012. Plaintiff Lucas timely filed her opposition on March 1, 2012. This is the Court's decision on the matter.

Standard of Review

Superior Court Civil Rule 54(d) states:

Costs. Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs.

Superior Court Civil Rule 54(h) states, "Fees for expert witnesses testifying on deposition shall be taxed as costs pursuant to 10 Del. C. 8906 only where the deposition is introduced into evidence."

10 *Del. C.* § 5101 states:

In a court of law, whether of original jurisdiction or of error, upon a voluntary or involuntary discontinuance or dismissal of the action, there shall be judgment for costs for the defendant. Generally a party for whom final judgment in any civil action, or on a writ of error upon a

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judgment is given in such action, shall recover, against the adverse party, costs of suit, to be awarded by the court.

In a civil suit, determining whether costs should be awarded is a matter of judicial discretion.¹ The word “generally,” as used in 10 *Del. C.* § 5101, means “for the most part,” or “usually.”²

Title 10, Section 8906 of the Delaware Code provides, “The fees for witnesses testifying as experts . . . shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case and shall be collected and paid as other witness fees are now collected and paid.”³ In Delaware, it is well settled “that the expert’s fee that is recoverable as a cost of litigation is limited to the time necessarily spent in actual attendance upon the Court for the purpose of testifying.”⁴ This includes testifying, waiting to testify, or traveling to testify.⁵

Generally, court filing fees are recoverable.⁶

DISCUSSION

Defendant requests Dr. Lawrence Piccioni’s expert deposition fee of \$1,500.00,

¹*Donovan v. Delaware Water and Air Res. Comm’n*, 358 A.2d 717, 722-23 (Del. 1976).

²*Id.* at 722.

³*Midcap v. Sears, Roebuck and Co.*, 2004 WL 1588343, at *2 (Del. Super. May 26, 2004).

⁴*Id.* (quoting *State v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966)).

⁵*Id.* at *3.

⁶*See id.* at *7.

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a videographer's fee of \$355.00, a court reporter's fee of \$238.43, and e-filing fees of \$169.00. Plaintiff Lucas opposes Picconi's expert deposition fee, the videographer's fee, and the court reporter's fee.⁷ The Court addresses each dispute in turn.

First, Plaintiff Lucas argues that, under *Reinke v. Furbush*,⁸ the going rate for a two hour deposition is between \$1,203.00 and \$2,406.00, making a reasonable one hour fee between roughly \$600.00 and \$1,200.00. Plaintiff Lucas asks that the expert fee be reduced to \$750.00. The Court agrees that the calculations performed in *Reinke* are proper when examining the reasonableness of a medical expert's deposition fee.⁹ According to the Medico-Legal Affairs Committee's 2006 report, the fee range for a deposition lasting up to two hours is \$1000 to \$2000.¹⁰ When adjusted for inflation,¹¹ the reasonable fee range for a two hour deposition in this case would

⁷Plaintiff Lucas's opposition does not match up with her prayer to the Court that she pay \$1,274.00 in costs. If the Court adjusted the costs as Plaintiff Lucas requested, the award would be the sum of the adjusted expert deposition fee of \$750.00, the videotape fee of \$60.00, and the e-filing fee of 169.00, or \$979.00.

⁸2011 WL 7063367 (Del. Super. Dec. 1, 2011).

⁹See *Reinke*, 2011 WL 7063367, at *2.

¹⁰MEDICO-LEGAL AFFAIRS COMMITTEE, RECOMMENDED GUIDELINES FOR MEDICAL EXPERT FEES (March 2006).

¹¹See *Enrique v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 2636845, at *1 (Del. Super. June 30, 2010).

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be between \$1,229.68 and \$2,459.35.¹² Therefore, a reasonable one hour fee would be between \$614.84 and \$1,229.68. Given the inflation-adjusted Medico-Legal Affairs Committee's recommendation, the Court, in its discretion, awards Defendant \$1,000.00 in costs for Dr. Lawrence Piccioni's expert deposition.

In terms of the videographer's fee and the transcript fee associated with Dr. Piccioni's video deposition, Plaintiff Lucas opposes the transcript fee and the videographer's fee pursuant to *Cimino v. Cherry*.¹³ The *Cimino* Court found that since a medical expert's deposition testimony was introduced through a video at trial, the videotape cost was allowed, but the deposition transcript was duplicative.¹⁴ With *Cimino* in mind, the Court, in its discretion, awards \$60.00 for videotape costs.

Plaintiff Lucas does not contest the \$169.00 in e-filing fees, and as such, the Court awards these fees.

¹²*Compare* BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX: MARCH 2006 (2006), available at http://www.bls.gov/news.release/archives/cpi_04192006.pdf (Medical Care, March 2006 Unadjusted Index: 333.8) with BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX – FEBRUARY 2012 (2012), available at http://www.bls.gov/news.release/archives/cpi_03162012.pdf (Medical Care, February 2012 Unadjusted Index: 410.466).

¹³2001 WL 589038 (Del. Super. May 24, 2001).

¹⁴*Id.* at *2.

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CONCLUSION

For the above stated reasons, the Court finds that Defendant is entitled to the following costs for litigating this matter:

Dr. Lawrence Piccioni's Expert Deposition Fee: \$1,000.00

Videotape Cost: \$60.00

Lexis E-Filing Fees: \$169.00

Total: \$1,229.00

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Counsel